

UNITED STATES FEDERAL COMMUNICATIONS COMMISSION

Rules and Regulations Implementing the Telephone Consumer  
Protection Act (TCPA) of 1991

Docket #: 02-278, FCC 03-153

Comments of:

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I. Introduction

I respectfully submit comments pursuant to the request for comment on the final rule of the Rules and Regulations implementing the Telephone Consumer Protection Act of 1991, published on July 25, 2003 in the Federal Register. Although this comment has been submitted long after the submission deadline, I respectfully request that The Commission consider my input and suggestions as I have extremely strong views on the issue.

Currently, I am a student at Villanova University School of Law, in Villanova Pennsylvania. I have an interest in the final rule both in my capacity as a telephone service subscriber, and as future lawyer. As an American with a landline in my home and a wireless phone that travels with me, the much needed regulations will have a direct effect on my daily experience just as it affects the hundreds of millions of Americans who engage in wired and wireless communications. I applaud the Commission for implementing the act as it is a regulation responsive to the outcries of millions of Americans who can no longer tolerate intrusive telemarketing activities.

I will comment on the propriety of the rule as a commercial speech regulation, the established business exception, FAX advertisement requirements, and implementation of a technologically enhanced "Do Not Call List database".

II. Summary of Comment

Section A: The telemarketing industry has challenged the "do not call list" (List), claiming that it acts as an impermissible restraint on commercial speech. However, the List and associated rules comply with the Supreme Court standard of regulating commercial speech established by the 3 prong test in Central

Hudson. The list and associated rules pass constitutional muster as (1) the Commission has a substantial interest in protecting citizens from undesired and misleading communications, (2) the regulation directly advances the substantial Government interest as it fulfills the wishes of the telephone owner to be free from unwanted calls and solicitations, and (3) the regulation is not more extensive than necessary to serve the Government interest as it does not establish an outright ban on telemarketing, simply allows citizens to opt-out of receiving undesired sales solicitations over their phone lines.

Section B: The established business relationship exception to the rule allows telemarketing to phone service subscribers who make contact with a business/entity through a transaction, inquiry or application. The phone owner (telephone service subscriber or subscriber), however may avoid telemarketing by making a simple request to be placed on the company's specific Do Not Call List. The exception within an exception is an inadequate means of preventing telemarketing as company specific lists have proven ineffective as they are extremely difficult to validate and enforce. The Commission must create more stringent methods and requirements to ensure that even those who have an established business relationship do not receive unwanted solicitations. The use of confirmation/tracking numbers and policies/procedures for telemarketers, and stiff fines for those who fail honor specific do not call requests would go far to ensure the enforceability of specific lists, while strengthening the regulation as a whole.

Section C: The regulations requirements for fax advertisements are also in need of additional language to increase protection of subscribers. Under rules 64.1200(a)(3)(i) and 64.1200 (d)(1), the Commission establishes a final rule requiring fax advertisers to obtain consent from the fax owner to receive fax advertisements. As it stands, the rule obliges the advertiser to obtain consent with only three qualifications: (1) express, written permission, (2) that clearly states consent to receive fax advertisements and (3) identifies the fax number of the machine an advertiser may communicate with. While the three requirements are a good start in counteracting undesired fax advertisements, additional requirements should be added to ensure that consumers are protected from unwanted solicitations. Additional provisions should require the consenting fax owner to list the name of the business/entity permitted to send fax advertisements to prevent transfer or assignment of the consent, provide a consent expiration date, require the permitted entity to retain consent forms, and place restrictions on an entity's method of seeking consent.

Section D: As it stands, the Do Not Call list is an excellent means of preventing telephone sales solicitations, however, the Commission may easily use available technology to allow the list registrant to narrow the do not call request. Internet technology will allow individuals registering for the list to place parameters on their do not call requests inasmuch as they may opt to forgo contact by certain industries. The commission could classify business within categories, and list these categories on the online registry adjacent to a check box. The registrant will

then have the ability to opt-out of telemarketing by a specific category of business, while opting to receive calls from all other businesses. The check box system will provide the registrant with the ability to make a more specific request, and will also counter industry claims that the Commission is attempting to ban telemarketing and the ancillary commercial speech.

### III. Substantive Comments

#### A. Rules Establishing and Facilitating the List Do Not Violate the 1st Amendment as they Conform to Standard of Regulating Commercial Speech.

Prior to the October 1, 2003 activation date of the do not call list, the telemarketing industry launched an aggressive attack on the list. Telemarketing companies individually and collectively in the form of trade groups filed claims in various federal courts, claiming that the list and ancillary rules violate principles of the 1st amendment with respect to freedom of speech. Ancillary to the 1st amendment claim is the 14th amendment claim of engaging in discrimination against commercial speech because the list restricts commercial telemarketing while placing no restraints on charitable or political solicitations.

Within the context of free speech, the federal Government is vested with the authority to regulate Commercial Speech under the United State Supreme Court's holding in *Central Hudson Gas & Elec. Corp. v Pub. Ser. Comm'n of New York*. In *Hudson*, the court provides a test applicable to commercial speech regulations to determine if the restriction is a violation of the first amendment. The restriction is analyzed under a three prong test, under which the regulation is valid upon the Government's demonstration of:

- (1) A substantial interest;
- (2) Material advancement of the Government interest through the restriction; and
- (3) Narrow tailoring of the regulation to ensure it is not overly excessive to meet the Government's interest.

1). The Government has a Substantial Interest in Regulating the Telemarketing Industry as it's Citizen's have Demanded Freedom from Unwanted Telephone Solicitations.

Before activation of the list, telemarketers placed over 104 million telemarketing calls per day to American homes. Those with phone lines in their homes, as well as wireless subscribers, would routinely receive solicitations over the phone at alarming frequency, often during a period in the day when most families were sitting down to the dinner table. Taking advantage of our democratic form of Government, phone owners vigorously expressed their distaste for telemarketing to their elected officials.

Because frustration and anger caused by telephone solicitations became a constant source of complaints received by elected Government officials, those in a position to relieve the burden were forced to act. This action manifests itself through the telephone sales rules enacted from 1991 through the present.

The Government has a substantial interest in responding to the valid concerns of its people, and thus, the Government has a substantial interest in placing restrictions on the telemarketing industry. The legislation restricting the activities of telemarketers is a direct response to the citizens who called upon their Government to save them from the frequent home invasions posed by the telemarketing industry. Recognizing the detriments presented to the typical phone owner, the Government had no choice but to respond to the concerns of their citizens. Absent the regulations, telemarketing is not an easily squashed annoyance, but a problem that poses financial burdens, privacy and safety concerns to phone service subscribers.

2) The List and Associated Rules Advance the Government's Substantial Interest Through Diminishing Financial Burdens, and Restoring Privacy and Safety to the Home with Respect to Sales Calls.

The significant interests in protecting the telephone owner by eliminating the financial burden, and restoring privacy and safety to the home compelled the Government to enact the regulations.

Before activation of the rules, sales calls produced a financial burden to the phone owner. First, before the rule placed an outright ban on telemarketing to wireless phones, cellular subscribers were essentially forced to pay for unwanted calls for each sales call in per minute charges to their service carrier. Second, in an effort to avoid sales calls, those with home phones connected by land lines felt induced to purchase the latest in telephone screening technology, such as the caller ID and enhanced answering machines. Regardless of the size of the burden, individuals should not feel compelled to pay the cost of avoiding unwanted sales calls. Preventing this financial burden to the consumer is one element that strengthens the Government's interest in creating the regulation.

Also capturing Government attention is the home privacy invasion created by telemarketing. A longstanding first amendment principle is the right of a citizen to be left alone in their own home. Frequent sales calls penetrate the walls of a citizen's home not for an important speech purpose such as providing emergency information or alerting to subscriber of other important information within the marketplace of ideas, but to make a sales pitch for a product that the subscriber most likely does not want or need. Sales calls are distinguished from television, and radio advertisements as it is difficult to avoid them by changing a channel or turning a dial. Before the rule's activation, an unwilling listener could not avoid sales calls without incurring a

financial burden or creating a hazard to themselves by unplugging the phone. Telemarketing connects a salesperson with a captive audience while chipping away at the individual's inherent right to privacy in their own home. This constitutionally rooted right to privacy is another element that strengthens the Government's interest in creating the regulation.

3) The List and Associated Rules Are not Excessive as They Simply Allow Those Who do not Wish to Receive Calls to Effectively Communicate this Desire to the Telemarketing Industry.

Commercial speech has never enjoyed the same protection as other speech categories because of its robust nature. Religious speech, political speech and other speech types enjoy heightened protection to prevent the quashing of unpopular notions and ideas condemned by the Government. The list and associated rules, however are not an attempt by the Government to annihilate a particular category of speech, but is a measure designed to facilitate communication between the ordinary citizen and the telemarketing industry.

Essentially, the FCC/FTC list acts as a conduit to transport the subscriber's desire to cease telemarketing calls to the telemarketing industry. The Government is not acting to quash commercial speech, but helps the consumer to convey to the request in an efficient manner. Prior to the activation of national and state rules, the Government attempted to allow the industry to regulate themselves by establishing company specific do not call lists. In theory, the telemarketer could telemarket to anyone, unless the individual made a specific request not to receive sales calls from the marketing entity. Self regulation of the industry proved to be ineffective as telemarketers would either ignore the request or abandon the call before an individual could complete the phrase, "please place me on your do not call list". Because the industry failed to adequately comply with the self regulation requirements, the Government was forced to intervene and enumerate the process to ensure that requests were acknowledged.

Further, the opt-out nature of the list is a permissible means of regulation from the perspective of the telemarketing industry. The industry may continue to contact a subscriber until the subscriber takes positive action to register with the list. If the Commission chose to structure the list with an opt-in format the rules would essentially have the effect of placing an outright ban on the commercial speech presented by telemarketing as very few citizens would register to receive sales calls.

Considering the industry's failure to regulate itself and the permissive nature of opt-out procedures, under the circumstances, the list is a narrowly drawn measure that prevents unwanted sales calls.

B. The Option Provided to Subscribers to Halt Telemarketing From Businesses with the Established Business Exception is a Flawed but Repairable, Protective Measure Due to Low Enforceability.

Under regulation definitions, an established business relationship will not protect an entity from a company specific no call request. If a request is made to an entity with an established business relationship, the entity is barred from placing telemarketing calls to the individual for a period of five years, even if the individual continues to complete transactions or inquiries with the entity.

The rule also states that the established business relationship does not extend to an entity's affiliates unless the consumer would reasonably believe that the entity may enjoy the established business relationship pursuant to the nature, goods and services provided and identity of the affiliate.

1) Consumer Inquiries and Applications are Improper Foundations For An Established Business Relationship.

The rule defines an established business relationship as a:

1. Prior existing relationship;
2. Formed by voluntary 2 way communication;
3. Between a person/entity and a residential subscriber;
4. With or without an exchange of consideration;

The relationship is formed by completing a transaction with the entity, or making an inquiry/application with the entity. The Commission defines an inquiry as calls or requests from an individual seeking product information. An application is a writing presenting inquiries or requesting goods or services.

Reasonable expectation is the theory behind the established business relationship, meaning that one who conducts business or submits inquiries or applications should reasonably expect the business to contact the prior purchaser with telemarketing calls. While a transaction is an appropriate ba